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December 11, 2006

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the
Communications Act of 1934, as amended, for Forbearance from Sections
251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area, WC Docket
No. 05-281

Dear Secretary Dortch:

Broadview Networks, Inc., Covad Communications Group and XO
Communications Inc., by their attorneys, submit this letter to address several issues raised by the
petition for forbearance filed by ACS of Anchorage, Inc. ("ACS") in the above-captioned
proceeding ("ACS Petition"). Specifically, we urge the Commission to:

- (1) Enable full participation in this proceeding by permitting the use of confidential information from the Qwest Omaha forbearance proceeding¹ (including the full unredacted version of the final order in that docket), to support pleadings filed in the ACS proceeding;
- (2) Apply the Section 10 forbearance standard separately to each distinct market identified in this proceeding;

¹ *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 ("Qwest Omaha Proceeding").*

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- (3) Require actual non-UNE-based competition, or, at a minimum, competition with a *de minimis* level of reliance on UNEs, before granting ACS any forbearance relief; and
 - (4) Refrain from granting ACS forbearance from a portion of the pricing standard contained in Section 252(d)(1)(A)(i) and the Commission's TELRIC pricing rules.
1. *The Inability To Use Confidential Information Submitted In The Qwest Omaha Proceeding Deprives Interested Parties Of Their Due Process Rights To Participate Fully In The ACS Forbearance Proceeding.*

ACS has requested forbearance from the unbundling obligations of Section 251(c)(3) as they apply to the Anchorage, Alaska study area and from the application of the Section 252(d)(1) pricing standard for unbundled network elements ("UNEs") to the extent ACS continues to offer UNEs in Anchorage.² ACS seeks the same Section 251(c)(3) forbearance relief granted to Qwest in September 2005 for nine (9) wire centers in the Omaha Metropolitan Statistical Area ("MSA").³ Indeed, in its advocacy ACS cites to the Commission's *Qwest Omaha Order* as support for its requested relief.⁴

Although the Commission indicated that its determinations in the *Qwest Omaha Order* were based on unique characteristics of the Omaha market that were not likely replicated in other areas,⁵ the determinations made in Omaha have been raised in the Anchorage proceeding. Consequently, the analysis undertaken and the framework and rationale relied upon by the Commission in the Qwest Omaha proceeding is relevant to the instant docket. It is therefore imperative that interested parties be permitted to utilize the confidential information from the Qwest Omaha proceeding so that they may prepare comprehensive and effective responses to ACS's arguments.

The protective order in the Qwest Omaha proceeding, however, prohibits the use of any confidential information contained in the Qwest Omaha docket, including the unredacted

² ACS Petition at 1.

³ *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Qwest Omaha Order*").

⁴ See e.g. Letter from Karen Brinkmann, et al., Counsel to ACS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281, at 1-5, 16-17, 19 (filed Nov. 30, 2006) ("*November 30th ACS Letter*").

⁵ See *Qwest Omaha Order*, n. 46.

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version of the *Qwest Omaha Order*.⁶ It is therefore impossible for interested parties to address the potential use of the *Qwest Omaha Order* as a “road map” for resolution of the instant petition or to analyze the competitive environment in the Anchorage market vis-à-vis the competitive environment in Omaha at the time the Commission decided the *Qwest Omaha* petition.

To cure this problem and ensure that all parties are able to participate in the instant docket in a fully informed manner, the Commission should grant the Motion to Modify Protective Order (“Motion”) filed in the *Qwest Omaha* proceeding.⁷ The Commission should permit the use of confidential information filed in the *Qwest Omaha* docket so that commenters may “fully review, analyze and respond to market-specific data submitted in the . . . ACS Petition.”⁸ Without this information, interested parties cannot properly assess whether the market-specific data submitted by ACS satisfies the statutory forbearance requirements.⁹ Commission grant of the Motion is particularly critical now as the deadline for ruling on the ACS petition is rapidly approaching.

2. *The Commission Must Apply The Section 10 Forbearance Analysis To Each Relevant Market.*

The Commission must conduct a complete forbearance analysis for each relevant product market¹⁰ in each geographic market (*i.e.* wire center) when determining whether ACS is

⁶ *Qwest Omaha Order*, 19 FCC Rcd 11377, ¶ 7 (2004) (restricting the use of confidential information filed in the proceeding to “this proceeding and any judicial proceeding arising there from.”) (“*Qwest Protective Order*”).

⁷ *See In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Motion to Modify Protective Order, 3 (filed Oct. 11, 2006).

⁸ *Id.* at 3.

⁹ *See id.*

¹⁰ ACS argues for two product markets – the residential market and the business market. *See* Statement of Kenneth L. Sprain ¶ 9 (“Sprain Decl.”), attached as Exhibit A to *Reply Comments of ACS of Anchorage, Inc. In Support of Its Petition for Forbearance from Sections 251(c)(3) and 252(d)(1)*, WC Docket No. 05-281 (filed Feb. 23, 2006). These markets, however, are inconsistent with the mass, small/midsize enterprise, and large enterprise markets identified in the *Triennial Review Order*. *See Initial Comments of NuVox Communications, Inc. and XO Communications Inc.*, at 37 (filed Jan. 9, 2006). GCI, on the other hand, argues in favor of three product markets, *i.e.* residential, small business and enterprise, and has supplied the Commission with abundant evidence to support those more granular definitions. *See* Letter from John Nakahata, Counsel to GCI, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 at 4 (filed Nov. 28, 2006). Further, GCI’s proposed product market definitions are supported by the product market

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eligible for forbearance from the obligations of Section 251(c)(3) of the Act. The Commission must not extrapolate from or use findings regarding the competitive environment in one market to justify regulatory forbearance relief for another market but, instead, must perform a separate analysis of the competitive environment in each product and geographic market before concluding whether forbearance relief is justified. The use of any shortcut in the analytical process could easily result in a determination that does not reflect very real competitive differences among the various markets, resulting in a grant of forbearance relief where none is warranted.

In this regard, the Commission should significantly improve upon its analysis in the *Qwest Omaha Order*. There, the Commission conducted a detailed analysis of the competitive environment in the mass market¹¹ but neglected to perform a similar analysis for the enterprise product market and improperly based Section 251(c)(3) forbearance relief for the enterprise market on competitive conditions in the mass market.¹² The forbearance analysis in the *Qwest Omaha Order* is inconsistent with the statutory requirements of Section 10 of the Act and should not be replicated in the case of Anchorage.¹³ Section 10 requires that the Commission first identify relevant product and geographic markets and then determine – for each of those markets – whether the requirements of Section 251(c) have been fully implemented. If the answer is yes, it must then analyze – separately for each market – whether all of the Section 10(a) requirements are met. The Commission should take care to conduct a full forbearance analysis for each product and geographic market identified as relevant to the relief requested by ACS.¹⁴

definition test in the *Horizontal Merger Guidelines* of the U.S. Department of Justice and the Federal Trade Commission. See *Horizontal Merger Guidelines*, Apr. 8, 1997, at 6.

¹¹ *Qwest Omaha Order*, ¶¶ 18-49.

¹² *Qwest Omaha Order*, ¶ 50, *appeal pending*, *Qwest Corp. v. FCC*, No. 05-1450 and consolidated cases (D.C. Cir.).

¹³ 47 U.S.C. §160.

¹⁴ ACS continues to make fatal errors in its market analysis. Among these errors are: presuming that a carrier's switch, as opposed to customer demand and access plant supply (the *Qwest Omaha Order* and *Triennial Review Remand Order* definitions), determine the geographic market; proffering only a vague and quite expansive definition of a "commercially reasonable period of time" for providing service; including services provided over coaxial cable plant as adequate substitutes for small business and enterprise customers; and, in general, failing to provide a precise analysis for the extent of competition in each product and geographic market. See Nov. 30th *ACS Letter*, at 7-9.

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3. *The Commission Should Require The Existence And Use Of Non-UNE Facilities Before Granting Forbearance Relief, Or Establish A De Minimis Standard Of Reliance On UNEs.*

We strongly urge the Commission to require evidence of significant actual non-UNE-based competition before eliminating the unbundling requirements of Section 251(c)(3) for any product or geographic market in the Anchorage study area. UNE-based service providers rely on ILEC facilities to serve their customers and this type of competition should not be considered sufficient to justify Section 251(c) forbearance. The Commission recognized the need for evidence of true facilities-based competition when it stated in the *Qwest Omaha Order* that “forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing ‘last-mile’ facilities is not consistent with the public interest.”¹⁵ The Commission further noted that forbearance was not justified when the ILEC “has not demonstrated that it is subject to significant competition from competitors that do not rely heavily on [the ILEC’s] wholesale services.”¹⁶ The Commission relied extensively – if not exclusively – on evidence of competition from Cox Communications, Inc. (“Cox”), a service provider that does not use Qwest-provided UNEs to serve its customers, in granting a portion of the forbearance relief originally requested by Qwest.¹⁷

Here, General Communication, Inc. (“GCI”), the primary competitor to ACS in Anchorage, today relies to a significant extent on UNEs obtained from ACS to provide service to its subscribers. Although GCI owns some facilities in Anchorage,¹⁸ the geographic coverage of those facilities is limited.¹⁹ GCI explains, for instance, that it often is unable to self-provide high-capacity services requested by medium-sized and large businesses.²⁰ GCI recently reiterated its reliance on UNEs to provide service in several *ex parte* filings.²¹

¹⁵ *Qwest Omaha Order*, ¶ 60.

¹⁶ *Id.* See also *id.* at n. 4.

¹⁷ *Id.* at ¶ 64.

¹⁸ Opposition of General Communication, Inc. to the Petition for Forbearance from Sections 251(c)(3) and 252(d)(1) of the Communications Act Filed by ACS of Anchorage, WC Docket No. 05-281, at 14-15 (filed Jan. 9, 2005) (“*GCI Comments*”).

¹⁹ *GCI Comments* at 14-15.

²⁰ *Id.* at 17-19; see also Attachment to Letter from John Nakahata, et al., Counsel to General Communication to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Nov. 14, 2006).

²¹ See e.g. Letter from John Nakahata, et al., Counsel to General Communication, Inc. to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281, at 3 (filed Nov. 14, 2006)

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Based on the principle enunciated in the *Qwest Omaha Order* regarding facilities-based competition, the Commission should find that the competition from GCI which exists today is not sufficient to justify ACS's request for Section 251(c)(3) forbearance relief anywhere in the Anchorage study area. If the Commission chooses to consider UNE-based competition in evaluating ACS's forbearance request, however, it should require that GCI's reliance on UNEs be only *de minimis* and that it be *de minimis* at the time forbearance relief is granted.

At bottom, the standard that should be applied by the Commission in determining whether forbearance from enforcement of the Section 251(c)(3) unbundling obligations is warranted is whether the grant of forbearance would harm competition. In Omaha, the Commission found "*substantial* intermodal competition for telecommunications services provided over Cox's own extensive facilities" and that "Cox, like Qwest is providing telecommunications services over its own *extensive* last-mile facilities."²² The Commission concluded that "Cox has been successfully providing local exchange and exchange access services . . . *without relying on Qwest's loops and transport.*"²³ The absence of notable UNE-based competition meant that the elimination of Qwest's UNE unbundling obligations would not result in significant harm to existing competition in the Omaha MSA. Conversely, there is no such evidence of significant facilities-based intermodal or intramodal competition in the Anchorage study area. As explained above, the only competition that exists within Anchorage today is reliant on Section 251(c)(3) UNE loops.²⁴ Consequently, a grant of forbearance would serve to substantially lessen competition in Anchorage. Forbearance relief therefore is not warranted.

Further, the Commission should not rely on evidence of future plans by GCI to offer service using its own facilities as justification for a grant of forbearance now. The Commission should require concrete evidence that, at the time the forbearance petition is acted upon, the relevant competitors provide all but a *de minimis* amount of their services utilizing

("GCI entered the Anchorage market on unbundled network elements (UNEs) and still relies on UNEs, particularly in the small business and enterprise markets, to serve customers today."); Attachment to Letter from Brita Strandberg, Counsel to General Communication, Inc. to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Nov. 9, 2006) ("In Anchorage, but not Omaha, there is specific record evidence that business customers served today with UNEs cannot be served by cable or fiber networks (or via any other alternative network) within a commercially reasonable period of time."); Attachment to Letter from John Nakahata, Counsel to General Communication, Inc. to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Nov. 20, 2006).

²² *Qwest Omaha Order*, ¶ 59 (emphasis supplied).

²³ *Id.*, ¶ 64 (footnote omitted, emphasis supplied).

²⁴ See e.g. Letter from John Nakahata, et al., Counsel to General Communication, Inc. to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281, at 8 (filed Nov. 14, 2006).

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their own facilities. It simply cannot be the case that forbearance from UNE unbundling obligations can be predicated on ongoing and significant UNE-based competition. The effect of such a grant of forbearance would undermine GCI's existing and planned facilities investments in Anchorage and would unreasonably punish GCI for doing exactly what Congress intended in the Telecommunications Act of 1996.

Refusing to grant premature forbearance relief in this way would not unduly prejudice ACS. As the petitioner, ACS alone chose when to file its petition, which commenced the 12-month (plus 90-day extension) clock provided for under Section 10. Likewise, ACS bears the burden to show that it meets the statutory forbearance standard at the time the petition must be acted upon. In the event of a denial, ACS would not be foreclosed from refileing its petition at a later date, if and when it is able to provide sufficiently compelling evidence to justify a grant of forbearance relief. It is exclusively within ACS's discretion to determine when to seek forbearance from any Commission rules or statutory requirements. ACS therefore should be held to strict compliance with Section 10's requirements at the time its petition must be acted upon.

4. *The Commission Should Not Forbear From Enforcement Of A Portion Of Section 252(d)(1)(A) And Should Instead Adopt An Appropriate Transition Period Before Any Forbearance Relief Is Effectuated.*

Denial of forbearance relief until it is clearly determined that UNE-based competition is *de minimis* is particularly critical in the instant proceeding due to the absence of a regulatory "backstop" to protect competitors and consumers in Anchorage. In the *Qwest Omaha Order*, the Commission relied upon the continued operation of Section 271(c) to develop and preserve local market competition in granting Qwest relief from its UNE loop and transport obligations arising under Section 251(c)(3).²⁵ The Commission noted that "while section 10(a) is satisfied with respect to forbearance from certain section 251(c)(3) unbundling requirements for loops and transport, that measure of deregulation is predicated upon the availability of other regulatory protections that function as a backstop to prevent harm to competition – including, most notably here, section 271(c)."²⁶ In Anchorage, however, Section 271 is not available to temper ACS's market behavior if forbearance relief is granted. Consequently, if ACS is freed from its Section 251(c)(3) unbundling obligations, it could refrain from offering wholesale loop and/or transport services or price DS1 and DS3 loops and transport at essentially any level it desires.

²⁵ *Id.*, ¶ 64.

²⁶ *Id.*, ¶ 103.

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The lack of any assurance of ongoing access to needed loop and transport facilities at just and reasonable rates and terms underlies GCI's recent suggestion that the Commission continue to require ACS to make loops and transport available under Section 251(c)(3) and limit any forbearance relief (assuming that the Commission finds some relief in some product and geographic market is warranted) to the rules that today govern the pricing of those UNEs.²⁷ Specifically, GCI proposes that the Commission: (1) forbear from the portion of Section 252(d)(1)(A)(i) which prevents states from relying on rate-of-return or other rate-based proceedings when evaluating UNE rates; (2) forbear from its TELRIC pricing rules; and (3) leave existing interconnection agreements in place.²⁸ GCI argues that "[b]y taking these steps, the Commission could grant ACS relief from TELRIC pricing while ensuring that ACS continues to offer access to UNE loops at 'just and reasonable' and 'nondiscriminatory' rates."²⁹

We share GCI's concerns regarding ACS's likely market behavior should the Commission grant it Section 251(c)(3) forbearance relief. To address this issue, the Commission should withhold Section 251(c)(3) forbearance relief until such facilities are no longer required by competitors to provide service. It can (and should) do so directly by denying ACS's forbearance request on the grounds that the primary competition in Anchorage today relies too great an extent on the use of UNEs. Alternatively, it can grant ACS Section 251(c)(3) forbearance relief subject to a multi-year transition period which would allow GCI the time needed to migrate off of UNEs. GCI itself suggests such a remedy.³⁰ Adoption of an appropriate transition period would ensure that facilities-based last-mile competition of the type deemed so critical in the *Qwest Omaha Order* exists in Anchorage at the time forbearance relief is effectuated.

We respectfully disagree with the wisdom of granting forbearance from part of the pricing requirement in Section 252(d)(1). As a threshold matter, it is unclear whether the Commission has authority to forbear from a portion of a statutory provision, especially when doing so would change the nature of the remaining portion of the requirement. Section 10 grants the Commission the right to "forbear from applying *any regulation or any provision* of this Act . . ."³¹ Yet GCI would have the Commission limit forbearance relief to a parenthetical portion of a single subsection of a particular provision. Further, GCI's proposal that the Commission forbear

²⁷ Letter from Christopher Nierman, Counsel to General Communication, Inc. to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281, at 3 (filed Nov. 16, 2006).

²⁸ *Id.*

²⁹ *Id.*


³⁰ See e.g. Letter from Christopher P. Nierman, Counsel to General Communication, Inc. to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281, at 5 (filed Oct. 5, 2006).

³¹ 47 U.S.C. § 160(a) (emphasis supplied).

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single subsection of a particular provision. Further, GCI's proposal that the Commission forbear from enforcing the parenthetical portion of Section 252(d)(1)(A)(i) – which modifies the clause immediately preceding it to limit the methodology that may be employed in pricing UNEs – would have the effect of altering the meaning of the remaining portion of Section 252(d)(1)(A). As a result, that subsection would be left with a meaning not intended by Congress.

Respectfully submitted,



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